Supreme Court, U.S.
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No. 98 571

# In The
# SUPREME COURT OF THE UNITED STATES
## October Term, 1998

NICOLE MARIE CARTER, as Administratrix of and the Estate of Vergil Braud, ET AL

Petitioner

VERSUS

KEVIN FENNER; JOEL TALLANT; CITY OF NEW ORLEANS

Petitioner

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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72 pp

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WHETHER IT IS PROPER TO SUBSTITUTE FEDERAL RULES OF CIVIL PROCEDURE FOR STATE CONTRACT LAW IN DETERMINING IF A CONTRACT BETWEEN TO PRIVATE CITIZENS OF THE SAME STATE WAS CONFECTED AND ENFORCEABLE?

WHETHER THIS COURT SHOULD ENFORCE THE SETTLEMENT AREEMENT GIVEN THAT THE STATE LEGISLATURE'S STATUTORILY EXPRESSED INTENT WAS TO HAVE THE COURTS APPLYING LOUISIANA LAW TO PROTECT A MINOR CHILD'S INTERESTS IN SETTLEMENT WHERE RIGID APPLICATION OF THE STATE CODAL PROVISIONS WERE DETRIMENTAL TO MINOR CHILD'S INTERESTS?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Nicole Carter, respectfully petitions the Supreme Court to issue a writ of certiorari to the United States Court of Appeals for the United States Court of Appeals for the Fifth Circuit to review a judgment upholding an opinion and jury verdict of the Eastern District Court for the State of Louisiana.

### Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is set forth in Exhibit A. The judgment of the United States District Court for the Eastern District of Louisiana is Exhibit B. The order denying rehearing is Exhibit C.

## STATEMENT OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. 1254. The United States Court of Appeals for the Fifth Circuit issued its Opinion in this case on March 20, 1998. The United States Court of Appeals for the Fifth Circuit issued a revised opinion in this case on April 8, 1998. Rehearing *en banc* was timely requested. Rehearing denied on April 22, 1998. See Appendix Exhibit C. This Petition was timely filed within 90 days of the panel rehearing denial, and is timely.

## CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES

### Rule 60(b) of the Federal Rules of Civil Procedure

Rule 60(b) of the Federal Rules of Civil Procedure provides that a party can have a judgment set aside if (1) the judgment is the result of an inadvertent mistake; (2) there exists newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason justifying relief from the operation of the judgment.

### Art. 2002. Annulment for vices of form; time for action

A final judgment shall be annulled if it is rendered:

(1) Against an incompetent person not represented as required by law;

(2) Against a defendant who has not been served with process as required by law and who has not entered a general appearance, or against who a valid judgment by default has not been taken; or

(3) By a court which does not have jurisdiction over the subject matter of the suit.

Except as otherwise provided in Article 2003, an action to annul a judgment on these grounds may be brought at any time.

### Art. 2003. Same; action lost through acquiescence

A defendant who voluntarily acquiesced in the judgment, or who was present in the parish at the time of its execution and did not attempt to enjoin its enforcement, may not annul the judgment on any grounds enumerated in Article 2002.

**Federal Rules of Evidence, Rule 401**

The Federal Rules of Evidence, Rule 401 defines relevant evidence as being "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

**Louisiana Civil Code article 1919:**

A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative.

**Section 1983 of Title 42 of the United States Code** provides:

(1) a significant injury that is causally linked to the use of force; and (2) the use of force that is excessive to the need.

## STATEMENT OF THE CASE

On October 5, 1992, in the person of police officer, Kevin Fenner, the City of New Orleans victimized minor child, Vergil Carter, by shooting and killing Vergil Braud who was the father of minor child Vergil Carter. Now, the City of New Orleans again has victimized the minor child by using the District Court and Court of Appeals to deny the infant child any monetary compensation and leaving the minor child fatherless and penniless.

On October 8, 1992, Nicole Carter, mother of minor child Vergil Carter, petitioned the court for Tutorship over her minor child Vergil Braud. On October 9, 1992, Nicole Carter was appointed tutrix by order of the state court. Caveat, this

matter was filed in state court but removed to federal district court.

After a cause of action had been initiated by the plaintiff, Nicole Marie Carter on behalf of Vergil Carter, the minor son of Nicole Carter and the decedent, Vergil Braud, and on behalf of the decedent's estate, a trial date was fixed for May 2, 1994. The district court encouraged the plaintiff and the defendants to engage in settlement discussions.

Settlement negotiations began amongst the then present Mayor, Sidney Barthelemy, his City Attorney, Kathy Torregano, and the petitioner's attorney, Sonje Wilkerson.

On April 29, 1994, in the person of then Mayor Sidney Barthelemy, the City of New Orleans and the petitioner reached a settlement agreement. On the same day, April 2, 1994, via telephone, the petitioner reported to the District Court that an agreement had been reached between the petitioner and the City of New Orleans. Subsequently and consequently, the agreement was reduced to writing and signed by the City of New Orleans and petitioner on the same day, April 2, 1994. In the person of City Attorney, Kathy Torregano, the City of New Orleans signed the written contract settling the case for one million dollars plus interest. The District Judge approved the settlement agreement in the form of a consent judgment that was signed and entered by the district court judge on May 2, 1994.

Also, on May 2, 1994, the City of New Orleans underwent a change in administrations after the mayor-elect, Marc Morial and the new City Attorney, Avis Russell were inaugurated. Under the new administration, the City of New Orleans did not seek an appeal of the judgment. Instead, the City chose to pursue a motion to vacate the consent agreement under Federal Rules of Civil Procedure, Rule 60(b)(6). On

September 4, 1994, the district court granted the Motion to Vacate the Consent Judgment pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure. The trial judge essentially found that the consent judgment was a mistake because there was not a "meeting of the minds" regarding interest and the agreement did not specifically release the former Chief of Police, Arnesta Taylor.

After the district court granted the Motion to Vacate the Consent Judgment, on September 8, 1994, the petitioner sought an appeal in the Fifth Circuit Court of Appeal for Louisiana pursuant to 28 U.S.C. 1291 and the "collateral order exception." Petitioner was unable to obtain relief in the Court of Appeals because of it's determination that the decision to vacate the consent agreement did not meet the requirements of the exception. This matter then proceeded to a trial on the merits in July, 1996 which resulted in a jury verdict in favor of the defendants.

On March 6, 1998 as revised April 8, 1998, the Court of appeals affirmed the district court decision to vacate the consent judgment, affirmed the jury verdict and concluded that the district court made no error in admitting evidence at trial to warrant granting Carter's request for judgment as a mater of law or a new trial. The petitioner appeals from the ruling of the court of appeals.

## REASONS FOR GRANTING THE WRIT

### A. THE DISTRICT COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE CONSENT JUDGMENT.

The court of appeal failed to address the trial court's erroneous ruling that the settlement agreement between the

parties was void because there was no meeting of the minds. The trial court granted the appellee's Rule 60(b) motion solely on the contract issue, i.e. no meeting of the minds. The Court of appeal did not address the one issue which decided the case, rather the Court of Appeal found the judgment void based on dicta discussed in the lower court's decision. However, petitioner maintains that even if in arguendo, the consent judgment is void, the underlying settlement agreement between the parties is valid.

The record is clear that the parties intended to settle for one million ($1,000,000) dollars, plus interest. Pursuant to La. Civ. Code Art 271, the compromise agreement was reduced to writing, as per the consent judgment, which clearly reflects the City's agreement to settle the case.

Testimony from the hearing also supports that an agreement existed between the parties. Mayor Sidney Barthelemy, acting in his official capacity, testified that he stood by the terms of the settlement. This testimony was bolstered by the testimony of the City Attorney Kathy Torregano, as well as appellant's counsel. The parties' actions pursuant to LA law show a clear and explicit meeting of the minds. No further judicial interpretation is permissible. La. Civ. Code art 2046; Grace v. Zapata Offshore Co., 653 So.2d 704, 706 (La. App. 4th Cir. 1995). The settlement was enforceable, passing muster under Felder v. Georgia Pacific Corp., 405 So.2d 521 (La. 1981), and is an exact reflection of the parties' intentions. Tarver v. Oliver H. Van Horn Co., 591 So.2d 1366 (La. App 4th Cir. 1991).

Consent to form an agreement is present in this case. LSA-C-C art 1927. Woodward v. Felts, 573 So.2d 1312 (La. App. 2d Cir 1991). In LA, settlement is the preferred mode of dispute resolution. Once an agreement is reached it is

enforceable by motion of either party. La. Civ Code art 970; See, also, La. Civ. Code art. 3071.

The written agreement and the testimony below reveal that all parties were of a single mind to settle this case. The sole plaintiff was Vergil Carter and per the agreement, only he would receive the money. The agreement was perfected on April 29, 1994 with the approval of the lawful Mayor, Sidney Barthelemy, and City Attorney Kathy Toregano, who had the power to bind the city. Thus, under LA law, the consent agreement became a valid contract. The definite terms and conditions were understood by all the parties. At the time of the agreement, Nicole Carter had the requisite authority under law to enter into a binding settlement agreement on behalf of her minor child. Mayor Sidney Barthelemy and Kathy Toregano had the requisite authority to bind the City. As all the parties agreed to settle the case per the terms in the written consent judgment and reflected by testimony at trial, the City should be compelled to honor its settlement contract.

The authority cited by the trial court to find that the settlement agreement was a mistake has not been relied upon by this Court to invalidate settlement agreements heretofore. Hence, the trial court abused its discretion and committed error by invalidating the agreement and this Court should be compelled to address plaintiff's assertion that the settlement agreement remains an enforceable contract.

Federal case law has been established on each specific section of Rule 60(b). Accordingly, each section of Rule 60(b) has its own legal tests that have been developed and must be satisfied for a party to prevail under the particular section under which the party brings its motion to vacate. It is established that a party who brings a motion to vacate under section 6 of Rule 60(b), must show that there exists extraordinary circumstances

that are not mentioned in any of the first five provisions listed under Rule 60(b).

In Murray v. Ford Motor Co., 770 F.2d 461 (5th Cir. 1985), the Court states that "Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive and the reasons justifying relief under 60(b)(1) cannot be the basis for relief under 60(b)(6)." Id. at 463-64. See Transit Casualty Co. v. Security Trust Co., 441 F.2d 788, 791 (5th Cir. 1971); 7 Moore's FEDERAL PRACTICE 6027(1). As stated above, the original Motion to Vacate the Consent Judgment was based on Rule 60(b)(6), but the Order which granted the motion was based on Rule 60(b)(1). The City never amended its motion to request relief under Rule 60(b)(1). The reasons given by the City of New Orleans which allegedly justified relief from the consent judgment do not meet the "exceptional circumstances" standard in order for a Rule 60(b)(6) motion to apply. In applying the court of appeal's holding in Murray, supra, nor can those same reasons justify relief from the consent judgment based on a Rule 60(b)(1) motion. Likewise, in Bailey v. Ryan Stevedoring Co., Inc., 894 F.2d 157 (5th Cir. 1990), the Court ruled that the plaintiff could not prevail under Rule 60(b)(6) because the relief that he sought fell under one of the other grounds enumerated in Rule 60(b). Thus, the United States District Court's attempt to salvage the City of New Orleans' Motion of Vacate the Consent Judgment, by substituting grounds for relief other than those originally pled for, is prohibited by standing jurisprudence, and if allowed to stand would lead to questionable judicial precedent.

## 2. THE DISTRICT COURT ABUSED ITS DISCRETION INSETTING ASIDE THE CONSENT JUDGMENT BECAUSE HIS INTERPRETATION OF MISTAKE IS INCONSISTENT WITH THE LAW.

Under Rule 60(b)(1), a party can have a judgment set aside upon a showing that the judgment itself is the result of a mistake. Fed. R. Civ. P. 60(b)(1).

The Order granting the Motion to Vacate the consent agreement provides that the mistakes which entitled the City of New Orleans to Rule 60(b)(1) relief were mistakes on behalf of the parties and their respective intentions. The Order cites alleged discrepancies such as released and non-released defendants, amount of interest on the judgment, and payment to proper parties. The Order erroneously classifies these alleged discrepancies as "mistake" which entitles one to Rule 60(b)(1) relief from a judgment or order.

In Hill v. McDermott, Inc., 827 F.2d 1040 (5th Cir. 1987), the Court found that "Rule 60(b)(1) does allow relief from final judgments on account of 'mistake,' and, in this circuit, the rule may be invoked for the correction of judicial error, but only to rectify an obvious error of law, apparent on the record. Thus, it may be employed when the judgment obviously conflicts with a clear statutory mandate or when the judicial error involves a fundamental misconception of the law." Id. at 1043. In the instant matter, the alleged mistakes do not involve any fundamental misconceptions of controlling law. Rule 60(b)(1) relief is designated for mistakes involving judicial error, not for mistakes on behalf of the parties. The mistakes that the City of New Orleans complained of involved alleged discrepancies of agreement, which could have been best addressed through a timely appeal or motion to amend the

judgment, not by a Rule 60 motion to have the entire consent agreement set aside.

In the present case, the district court judge stated in his Order and Reasons that the fact that the consent judgment provided for interest "was a mistake, clearly not the agreement by the Mayor." This is incorrect. On page 35 of volume I of the Motion to Vacate transcript, the former Mayor states that he believed that the settlement plus interest was an appropriate amount for this case. The district judge further states in the Order and Reasons that failure of the consent judgment to mention the release of claims against former Chief of Police Arnesta Taylor was "clearly inadvertence not anticipated by the Mayor or the City Attorney." This is also incorrect in that the thirty day dismissal as well as the consent agreement dismissed all defendants. The judge went on to reiterate that the enforceability of a consent judgment is determined under the law of the forum state, and consequently found that "if there was a 'meeting of the minds' between Mayor Barthelemy and Ms. Wilkerson, such meeting was not reflected in the Consent Judgment."

However, the judge's reasoning in his decision is not consistent with the law under Rule 60(b)(1). The type of mistake that the judge stated was made by the parties is not an obvious misinterpretation of the law. The inclusion of legal interest in the consent judgment and the failure to specifically mention the former Chief of Police as one of the parties to be released in the consent judgment, are not misinterpretations of law. Furthermore, the judge's ruling regarding the non-release of the former Chief of Police as a mistake is rectified by the 60 day order, which dismissed the plaintiff's complaint. In Mull v. Marathon Oil Company, 658 F.2d 386 (5th Cir. 1981), the Court held that a settlement that was memorialized by a 60 day dismissal order was confirmed.

**3. THE DISTRICT COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE CONSENT JUDGMENT BECAUSE IT IS AN ENFORCEABLE SETTLEMENT AGREEMENT BETWEEN THE PARTIES.**

The City of New Orleans' conduct throughout this matter evidences its improper and intent to disavow the consent agreement based on a political disagreement between one City Administrative (Morial) with the decision of another (Barthelemey). However, federal and state law favors the validity and enforceability of consent agreements. Consent agreements by their very nature are binding because they possess the essential ingredient of mutual agreement between the parties. As to their enforceability, consent decrees share sufficient attributes with contracts to be enforced as such. See United States v. ITT Continental Baking Co., 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975); Eaton v. Courtauld of North America, 578 F.2d 545 (5th Cir. 1978). See also Ho v. Martin Marietta Corp., 845 F.2d 545 (5th Cir. 1988).

In Bowman v. City of New Orleans, 914 F.2d 711 (5th Cir. 1990), plaintiffs, street musicians, filed suit against the City to enjoin a city ordinance banning all music performances during Mardi Gras. The parties entered into a consent judgment whereby the City agreed to pay attorney's fees, court costs, and interest which began accruing on February 1, 1988 for any unpaid fees and costs, but no interest. The district court denied the City's motion to stay and to quash the writ of execution. The Court of Appeals affirmed the district court's ruling finding that the district court had the authority to enforce a consent judgment against the city after it failed to pay interest owed on amount of judgment. Id.

The validity and enforceability of a consent decree was also upheld in Roberts v. St. Regis Paper Co., 653 F.2d 166 (5th Cir. 1981). The enforceability of the decree was challenged by the defendant. However, the district court ruled that the consent decree was to remain in effect. The Court of Appeals affirmed quoting United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed. 256 (1971):

> "[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and their resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of the consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Id. at 171.

Thus, it is clear that the consent decree executed between the City of New Orleans and the plaintiffs is valid, has legal effect, and is enforceable. The duly empowered representatives of the City of New Orleans at the time of the consent agreement support its validity. With this intent, the City Attorney, authorized, executed, and completed the consent agreement with the plaintiffs. Therefore, the current City Administration should be barred from taking the position that the consent agreement, a document so clear, evident, and deliberate on its face, does not reflect the true intentions of the parties to the agreement and should not be enforceable.

In further support, Walker v. U.S. Dept. of Housing and Urban Dev., 912 F.2d 819 (5th Cir. 1990) provides that

> "as a general principle, a consent decree is a product of negotiation and compromise entered

> into by parties with divergent purposes, but aligned for the simple reason of avoiding costly and protracted litigation. The respective obligations of these parties are discerned strictly from within the agreement's four corners, as written, and not from the articulated purposes of either party. Nor are courts, as attempted by the district court in the case at bar, at liberty to redraft or redefine the obligations commanded by the consent agreement absent consent of the parties. ('Whether right or wrong, [the decree] is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.')"

Id. 825, (quoting U.S. v. Swift & Co., 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932)). Therefore, the consent judgment in its complete form, evidenced the parties true and complete intentions with respect to resolving the matter of Vergil Braud's death by a New Orleans Police Officer. None of the City's subsequent hindsight, second thoughts, brainstorms, or bright ideas can have any affect upon the consent decree because they are not contained within the document itself.

The fact that there exists a consent agreement, duly authorized and executed, between the City of New Orleans and the plaintiffs which provides for one million dollars plus interest in damages for the brutal and wrongful death of Vergil Braud at the hands of a New Orleans Police Officer simply controls in this matter. Roberts v. St. Regis Paper Co., supra, provides that "a consent decree is basically a contract between the parties and must be construed in the light of traditional tenets of contract construction...unless the decree is ambiguous, we must find the meaning of the decree in its language, without resort to extrinsic

consideration." Id. at 171.

Likewise, in Davis v. Huskipower Outdoor Equipment Corporation, 936 F.2d 193 (5th Cir. 1991), the Court ruled that the settlement agreement in that case was enforceable, where it contained a broad release of all defendants, and then stated only two of the defendants by name in the release agreement. In its analysis, the Court quoted that:

> "When the words of the contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. The aim of a contract interpretation is the discernment of a compatible meaning to all provisions of an agreement."

Id. at 196 (quoting Investors Assocs. Ltd. v. B.F. Trappey's Sons, Inc., 500 So.2d 909, 912 (La.Ct.App.), cert denied, 502 So.2d 116 (La. 1987)).

In addition, in Michot v. Mose, 94-784 (La.App. 3 Cir. 10/17/94), 649 So.2d 441, the Court of Appeal upheld a settlement agreement where the plaintiff entered into a settlement agreement with two defendants and one defendant later claimed to not have been aware of a potential defense until after the agreement had been executed. The court reasoned that where all the parties knew and approved of the terms of the agreement before signing it, "the agreement had been properly perfected in writing." Id. at 443.

It is established that parties cannot set aside a judgment based on the carelessness or negligence of the attorney or a party's ignorance of the law. In Bohlin v. Banning Co., Inc., 6 F.3d 350 (5th Cir. 1993), where the plaintiff claimed that he misinterpreted the local state rules concerning a motion to

dismiss, the Court ruled that the trial court did not abuse its discretion in denying the plaintiff's motion based on Rule 60(b)(1) and (6). Id. at 357.

If the City of New Orleans is allowed to dishonor this consent judgment because of a change in administration, then consent decrees, settlements, compromises, or any agreement will almost assuredly be subject to an eventual challenge by the City. Even judgments entered into years ago will be vulnerable to attack on the grounds that the City's true intentions were not reflected therein.

In Bowman v. City of New Orleans, supra, the Court of Appeal did not allow the City its desired unbridled discretion with respect to its binding agreements. The Court upheld the consent decree, and stated "[w]hile it is admirable that the City willingly recognized its obligation, it would have been better for all concerned had it also willingly met that obligation. That it did not give rise to the need for the district court to require it to do so." Id. at 713.

The trial court and the Court of Appeal misapplied LA law regarding the settlement of the minor, Vergil Carter's claim. The tutorship laws are designed to "protect all minors against the possible consequences of immaturity[.]" Johnson v. Ford Motor Company, 707 F.2d 586, 589 (5th Cir. 1983)( quoting State in Interest of Dino, 359 So.2d 586, 593 (La)). Tutorship laws must not be used by the court to harm a minor.

Vergil Carter's mother is the natural, declared tutor. As the Southern Shipbuilding Corporation v. Richardson, court noted, a mother's obligation to conserve the minor's estate should prevail over the technical requirements of the Civil Code. 363 So.2d 1329, 1331 (La. App 4th Cir. 1978). The Civil Code and the Code of Civil Procedure require a tutor to act under

color of title. Furthermore, under the Civil Code and Cacibauda v. Gaiennie, 305 So.2d 572 (La. App 4th Cir. 1974), a mother has a natural obligation to her minor child. Southern Shipbuilding, supra, supports the position that a mother should have some flexibility in settling a minor's claim. Without such flexibility, there would be "far reaching" effect on the ability to resolve a minor's claim. Id. at 1331.

To rigidly enforce the tutorship laws in this matter would serve only to the child's detriment. As stated supra, these rules are designed to promote the child's best interest. Clearly, the one million dollar settlement agreement the tutor arranged solely for Vergil Carter, benefited the minor. Further, as noted by the Southern Shipbuilding court, the rigid application of the law applied by this Court would cause a tension between a mother's obligation under the Civil Code and the requirements of tutorship.

Also, the Court of Appeal broadly over states that "post hoc judicial approval of a consent judgment" would eviscerate Civ Code art 4271. Code articles 4271 and 4272 are not mutually exclusive but rather should be read together. Art. 4271 requires court approval before a minor's action may be compromised. Art. 4272 provides approving of any proposal before money can be paid out. In the case at bar, an agreement had to be worked out prior to seeking state court approval, otherwise there would be nothing to bring before the court. Unlike Hellmers, no money was exchanged and Vergil Carter's mother was already named natural tutrix. Hellmers, 637 So.2d at 1308.

Further, in this case there was ample time for state court supervision of the settlement after the consent judgment and prior to satisfaction of the judgment. See, Hellmers, at 1307-08. In reality, this is exactly how these claims are settled. The

settling parties reach an agreement and then go before the state court for approval at the time of the judgment's satisfaction. This is the exact situation at bar. The federal judgment would have been brought before the state court in full compliance with the Civil Code and Rules of Civil Procedure, thereby allowing the necessary amount of judicial supervision. The primary reason that a petition for authority to settle a minor's claim was not presented to the Court in this matter was that the defendant, who normally drafts such a petition, elected to move to vacate the judgment.

In the case at bar, Vergil Carter would be the sole beneficiary of a one million dollar settlement, unlike the settlement cited by this Court In re Tutorship of Ingraham, 565 So.2d 1012 (La. App. 1st Cir. 1990), where the minors received only 20% of a $2,000,000 settlement. The instant matter is factually distinguishable from Ingraham as no **individual** payment was directed to any other party other than the minor.

Snowden v. Huey P. Long Memorial Hospital, (581 So. 2d 287 Cla.App. 3rd Cir. 1991), citing Ingraham, supra, holds that a court must determine if the details of the compromise are in the best interests of the minor. Id. at 290. After the settlement is before the court, the court can render a judgment of homologation pursuant to La. Civ Code art 4271. Unlike the general terms of the agreement in Snowden, the specific terms of Vergil Carter's settlement agreement would have satisfied the terms of La. Civ Code 4271, had there been an opportunity to seek a judgment of homologation.

The facts of this case fully allow a state court's meaningful exercise of authority over proposed settlements to minor's claims. However, an overly rigid interpretation of the rules of tutorship would serve only to harm Vergil Carter, the very person these rules are designed to protect. Plaintiff

respectfully asserts that the protection that this Court would impose upon Vergil Carter to "protect" him from gaining a $1,000,000 settlement is in direct contravention of LA law as this is not the protection contemplated by the laws governing minor settlements. This Court's ruling unfairly punishes the child where a just remedy exists that would still allow the court to exercise its supervisory authority to approve minor settlements.

**4. UNDER LOUISIANA LAW THE ALTERNATE REASONS DISCUSSED IN THE DICTA OF THE DISTRICT COURT ORDER AND REASONS ALSO DO NOT WARRANT SETTING ASIDE THE CONSENT AGREEMENT.**

The City has no standing under Louisiana law to attack the settlement because of its allegation of a lack of an authorized minor settlement. Only the minor, through the minor's authorized representative, in Louisiana has the right to challenge a settlement based on this argument.

In determining whether or not the City has standing to challenge a settlement because it is null based on the alleged lack of procedural compliance with the prerequisites of a minor settlement, the Court should look to Louisiana Civil Code article 1919. That provision states:

> A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative.

Furthermore, Code of Civil Procedure articles 2002 and 2003 prohibit defendants from raising the issue of nullity based

on the lack of approval of the minor's settlement. Louisiana Code of Civil Procedure Article 2002 states:

> **Art. 2002. Annulment for vices of form; time for action**
>
> A final judgment shall be annulled if it is rendered:
> (1) Against an incompetent person not represented as required by law;
> (2) Against a defendant who has not been served with process as required by law and who has not entered a general appearance, or against who a valid judgment by default has not been taken; or
> (3) By a court which does not have jurisdiction over the subject matter of the suit.
>
> Except as otherwise provided in Article 2003, an action to annul a judgment on these grounds may be brought at any time.

However, Code of Civil Procedure 2003 specifically indicates that the City as a defendant cannot even raise the issue of nullity because its action is lost by signing the consent judgment. Louisiana Code of Civil Procedure article 2003 states:

> **Art. 2003. Same; action lost through acquiescence**
>
> A defendant who voluntarily acquiesced in the judgment, or who was present in the parish at the time of its execution and did not attempt to enjoin its enforcement, may not annul the judgment on any grounds enumerated in Article

2002.

In Southern Shipbuilding Corp. v. Richardson, 372 So.2d 1188 (La. 1979), the mother of minor parties to a settlement agreement attempted to have the contingency contract for attorney fees set aside because she was not appointed as the tutrix before the contract was signed. The Louisiana Supreme Court ruled against the parent stating that the purpose of the minor settlement in Louisiana is to conserve the minor's estate. Id. at 1190.

The State Supreme Court further stated that where there was no exchange of funds pursuant to the settlement agreement, "protection of the minor's estate in this situation can be accomplished by the tutrix's qualification prior to or coincident with petitioning the court to approve settlement of the minor's claims after a tentative settlement thereof has been agreed upon." Id. at 1190. Additionally, In Re Tutorship of Ingraham, 565 So.2d 1012 (La.App. 1 Cir. 1990) and Succession of Hellmers, 637 So.2d 1302 (La.App 4 Cir. 1994), are other cases that support the proposition that state court approval of minor settlements is still petitioned for on a timely basis **after** settlement has been reached and **prior** to satisfaction of the settlement terms. Likewise, as this case stands, there has been no exchange of funds or a release of the minor's claims. The plaintiff has already been appointed as the tutrix for the minor and has merely confected an agreement resolving the issues of the case. Therefore, the appropriate remedy in this case is not to invalidate the settlement agreement, but to allow the plaintiff to seek approval of the minor settlement, if state law is applicable.

**B. THIS COURT SHOULD SET ASIDE THE JURY'S VERDICT, GRANT A JUDGMENT AS A MATTER OF LAW IN FAVOR OF THE PLAINTIFFS AND/OR ALTERNATIVELY GRANT A NEW TRIAL BECAUSE THE JURY'S VERDICT IS NOT CONSISTENT WITH THE LAW APPLICABLE TO THIS CASE.**

It is established that a judgment as a matter of law is properly rendered if the facts and inferences in a case point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict. Stroik v. Ponseti, 35 F.3d 155 (5th Cir. 1994). In the present case, the evidence presented at the trial on the merits overwhelmingly showed that the use of force by both Kevin Fenner and Joel Tallant was excessive to the need.

The law governing cases brought under section 1983 of Title 42 of the United States Code clearly provides that the elements that must be proven to maintain an action under section 1983 are the following: (1) a significant injury that is causally linked to the use of force; and (2) the use of force that is excessive to the need. Stroik v. Ponseti, 35 F.3d 155 (5th Cir. 1994). See also, Johnson v. Morel, 876 R.2d 477 (5th Cir. 1989); Fontenot v. Cormier, 56 F.3d 669 (5th Cir. 1995); and Tallan Hare v. Townley, 45 F.3d 914 (5th Cir. 1995).

In determining whether the use of force was excessive to the need, the Court in Stroik applied the "objectively unreasonable" standard as set forth in Graham v. Conner, 490 U.S. 386, 395 (1989). In Stroik, the Court examined whether the use of force was objectively reasonable in light of the facts and circumstances confronting the officer, without regard to the officer's underlying intent or motivation. Id. at 158 (citing

Graham v. Conner, 490 U.S. 386, 395 (1989)). The Court applied precedent to state that "if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Id. at 158 (citing Tennessee v. Garner, 471 U.S. 1, 6-11 (1985)).

Applying the above referenced case law to the facts in the instant case, the jury's verdict is clearly incorrect. The evidence presented in this case unequivocally shows that Vergil Braud was unarmed and was not threatening either Kevin Fenner or Joel Tallant with any deadly weapon at the time that he was shot. In fact, the evidence shows that Vergil Braud was fleeing from the defendants at the time of his shooting.

Kevin Fenner testified that he had frisked Vergil Braud and did not find a weapon on his person. Moreover, six additional witnesses, two of whom were called by the defendants, all testified that Vergil Braud was unarmed. Furthermore, the same six witnesses testified that they did not see Vergil Braud reaching for Joel Tallant's gun at any point during the confrontation. Moreover, Joel Tallant further testified that he did not actually see Vergil Braud reaching for his gun at the time that he was shot by Kevin Fenner. Most importantly, Joel Tallant testified that his gun was dusted for fingerprints immediately after the altercation and no fingerprints were found on his gun. This testimony was totally uncontroverted by the defendants.

Accordingly, the evidence overwhelmingly shows that Vergil Braud was beaten in violation of his constitutional rights. Therefore, the jury's verdict that the defendants, Joel Tallant and Kevin Fenner were objectively reasonable in beating Vergil Braud should be set aside and this Court should render a judgment as a matter of law in favor of the plaintiffs.

## C. THE TRIAL JUDGE ERRED IN PERMITTING WITNESS TESTIMONY REGARDING VERGIL BRAUD'S VIOLENCE IN THE HOME.

The issue is whether the testimony regarding the decedent's acts of violence in the home was relevant to determine if the police officers, Kevin Fenner and Joel Tallant, used excessive force to detain the decedent. The Federal Rules of Evidence, Rule 401 defines relevant evidence as being "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401.

In addition, case law interprets evidence as being relevant "when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from that evidence." U.S. v. Allison, 474 F.2d 286, 289 (C.A. La. 1973), cert. denied 95 S.Ct. 91. Also implicit in the definition of relevant evidence is the requirement that the evidence be probative of the proposition that it is offered to prove and that the proposition to be proved be one that is of consequence to the determination of the action. U.S. v. Hall, 653 F.2d 1002 (C.A. La. 1981).

At trial, defendants introduced testimony regarding decedent's violence in the home to support their argument that the deadly force used in arresting the decedent was not excessive. The admission of this evidence was error because it had no probative value. Violence in the home had no bearing on the police officer's decision to restrain Vergil Braud by inflicting him with a fatal gun shot wound. It is the totality of the circumstances surrounding the arrest that is relevant to the

determination of whether or not the officers used excessive force. Lennon v. Miller, 66 F.3d 416 (C.A. 2 N.Y. 1995). Obviously, the police officers could not have considered Vergil Braud's violence in the home in their decision of what force was necessary to restrain him because those were specific acts of which they were not aware.

In light of the circumstances surrounding the excessive use of force used to restrain Mr. Braud, it is clear that any evidence regarding a history of violence in the family was nonprobative because it was not a consideration in the police officer's decision to shoot Mr. Braud. Officer Fenner even testified that the only actions warranting the excessive force used by the officer in this case would have been if Mr. Braud was armed. Therefore, based on the foregoing argument, the trial judge erred in admitting testimony regarding Vergil Braud's history of violence. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FRE 403. Relevant evidence is inherently prejudicial, however, it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter. U.S v. McRae, 593, F.2d 700 (C.A. Tex. 1979), rehearing denied 100 S.Ct. 128. Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis or might cause the jury to base its decision on something other than the legal propositions relevant to the case. Carter v. Hewitt, 617 F.2d 1961 (C.A. Pa. 1980). Introduction of decedent's history of violence in this case, if at all relevant, was improper because it was unfairly prejudicial and of no probative value.

**D. THE TRIAL COURT ERRED IN ALLOWING A CORONER, TESTIFYING AS AN EXPERT WITNESS TO TESTIFY REGARDING THE BEHAVIOR OF A PERSON WHO IS UNDER THE INFLUENCE OF ALCOHOL.**

The trial judge abused his discretion by allowing the coroner to testify on the issue of the behavior of people under the influence of alcohol.

The test to determine whether a witness is qualified as an expert is to inquire whether his knowledge of the matter in relation to which his opinion is asked is such that it will probably aid the trier of the question to determine the truth. Chicago, Great Western Ry. Co. v. Beeher, 150 F.2d 394 (C.C.A. Minn. 1945), cert. denied 66 S.Ct. 339. "[T]he expert witness' background must show qualification sufficient to permit expression of opinion that is borne of specialized knowledge or expertise which allows the expert to give opinion evidence in the first instance." Anderson v. National R.R. Passenger Corp., 866 F.Supp. 937, 943 (E.D. Va. 1994). The court should disregard expert opinion if it is mere speculation, not supported by facts. FRE 702. Id. at 943.

Dr. Paul McGarry was tendered as a coroner, an expert on the cause of death of Vergil Braud, which in no way qualifies him to offer an opinion on Vergil Braud's behavior while under the influence of alcohol. The trial judge should not have allowed Dr. McGarry's testimony on this issue because he lacked experience, training, and a base of knowledge on the issue of how alcohol influences the behavior of a person.

Therefore, the coroner's testimony in this regard was

mere speculation which should not have been allowed by the court. Accordingly, this Court should grant the plaintiffs' motion to set aside the verdict and render judgment as a matter of law in plaintiffs' favor, or alternatively, for a new trial.

## V. CONCLUSION

The Court should grant certiorari to review this important matter. Errors of law occurred as the lower courts improperly addressed the enforceability of the settlement agreement, misapplied Louisiana tutorship laws, allowed prejudicial evidence to be used at trial, and misconstrued the facts of this case. The district and circuit courts need guidance as to the standard that applies for finding whether a contract exists or is enforceable. The Fifth Circuit's ruling contradicts several lines of Louisiana controlling authority. It improperly approves nullifying a contract to void a settlement reached by the parties to the written agreement and thus undermines protection of minor interest demanded by the state legislature. Avoiding the deleterious effect on state law of tutorship is something worthy of certiorari by this July body.

The Court should grant certiorari, reverse the Fifith Circuit and order that the petitioner was entitled to enforcement of settlement agreement. In the alternative, this Court should order a new trial.

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July, 1998

# APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

No. 96-31006

NICOLE MARIE CARTER, as Administratix of and the Estate of Vergil Braud; JACQUELINE ESTEEN, individually and as tutrix of the minor child Tahara Braud; CHRISTY FRANCIS

Plaintiffs - Appellants

v.

KEVIN FENNER; JOEL TALLANT;
CITY OF NEW ORLEANS

Defendants - Appellees

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NICOLE MARIE CARTER, Administratix of and the Estate of Vergil Braud

Plaintiffs

v.

KEVIN FENNER; ET AL

Defendants

KEVIN FENNER; JOEL TALLANT; CITY OF NEW ORLEANS

Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before EMILO M. GARZA, STEWART AND DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is

ENTERED FOR THE COURT:

s/Carl E. Stewart
United States Circuit Judge

REHG-2

# APPENDIX B

**REVISED, April 8, 1998**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

NICOLE MARIE CARTER, as Administratrix of and the Estate of Vergil Braud; JACQUELINE ESTEEN, individually And as tutrix of the minor child Tahara Braud; CHRISTY FRANCIS,

Plaintiffs-Appellants,

and

TAHARA BRAUD,

Appellant,

versus

KEVIN FENNER; JOEL TALLANT; CITY OF NEW ORLEANS,

Defendants-Appellees.

NICOLE MARIE CARTER, Administratrix of and the Estate of Vergil Braud

Plaintiffs

versus

KEVIN FENNER; JOEL TALLANT; CITY OF NEW ORLEANS,

Defendants-Appellees.

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Appeal from the United States District Court
For the Eastern District of Louisiana

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March 6, 1998

Before EMILO M. GARZA, STEWART, and DENNIS, Circuit Judges.

CARL E. STEWART, Circuit Judge:

This appeal asks us to determine whether (1) a consent judgment entered into between plaintiff-appellant Nicole Marie Carter and defendant-appellee City of New Orleans was properly vacated by the district court pursuant to Federal Rule of Civil Procedure 60(b); (2) the district court should have set aside the jury verdict in the underlying wrongful death action and granted a judgment as a matter of law and/or a new trial; and (3) the district court erred in admitting certain testimony at trial. Addressing each contention in turn below, we AFFIRM the district court.

The written consent judgment in question was confected at the culmination of pretrial settlement negotiations between the parties--- purportedly settling the wrongful death claim which Carter brought on behalf of her son for $1,000,000 plus interest from the date of judicial demand. Shortly thereafter, the City challenged the validity of the consent judgment. The district court recalled, vacated, and set aside the consent judgment pursuant to Rule 60(b)(1), finding that the consent judgment could not stand due to mistake and inadvertence on the part of both parties to the agreement. Because we find that the consent judgment was void as a matter of Louisiana law, we AFFIRM the judgment of the district court pursuant to Rule 60 (b)(4). In addition, finding that Carter did not present evidence sufficient to show that the jury's verdict is inconsistent with the applicable law, we AFFIRM. Finally, we conclude that the district court made no error in admitting evidence at trial to warrant granting Carter's request for judgment as a matter of law or a new trial.

## I.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 5, 1992, New Orleans police officer Kevin Fenner shot and killed Vergil Braud[1] Carter subsequently brought suit on behalf of her minor son, Vergil Carter and Estate of Vergil Braud. The defendants in the suit were Fenner; the City of New Orleans ("City"); Arnesta Taylor, the City Police Chief; and Joel Tallant, Fenner's companion police officer.[2] Trial of the case was set for May 2, 1994---which also happened to be inauguration day for Mayor-Elect Marc H. Morial and other recently elected city officials. Prior to the trial date, the parties entered negotiations toward settlement. As the result of a meeting held on April 29, 1994 between Carter's attorney and then Mayor Sidney J. Barthelemy, a agreement was reached which was later incorporated into a written consent judgment between the parties. Acting just three days prior to the end of his

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[1]The circumstances surrounding the shooting are a matter of great dispute between the parties. Fenner testified at trial that he shot Braud to protect his partner, Joel Tanner, and that Braud was actually pulling Tallant's gun out of its holster at the time Fenner shot him. Fenner offered further testimony that Braud's behavior was of combative and threatening nature such that Fenner believed himself and/or Tallant to be in danger. Carter's brief, on the other hand, maintains that witnesses at trial testified that Fenner beat Braud on the head while his hands were placed on the top of the police car and otherwise used excessive force on the decedent. Carter further suggests that Braud did not pose a threat to the officers at the time of his shooting.

[2]A companion suit was also filed in relation to the October 5 shooting incident. Except for Taylor, the defendants to the companion suit were the same as those named in the primary action. The plaintiffs, in addition to Carter, included Jacqueline Esteen (the mother of Vergil Braud), in her individual capacity and as tutrix of Tahara Braud (Vergil Braud's minor sister), and Christy Francis (major sister of Vergil Braud). These two suits were consolidated for trial. On May 13, 1997, Esteen, Tahara Braud, and Francis ---as appellants in this action---
filed a notice with this court pursuant to Fed.R.App.P. 28(I) adopting all portions of Carter's brief relating to the trial on the merits, but not those relating to the consent judgment. Thus, our determination of the issues stem from the trial on the merits apply to Esteen, Tahara Braud, and Francis' claims as well as to Carter's.

tenure in office, Barthelemy authorized former City Attorney Kathy Torregano to settle the case.[3] The resulting consent judgment was signed by Carter's attorney---Sonje Wilkerson---and Torregano. Receiving notification of the consent judgment that same day, the court canceled the jury trial. The consent judgment was presented to the court on May 2, 1994 and filed on that date as well.

On April 5, 1994---after his election, but prior to his taking the oath of office---Morial had requested in writing that Barthelemy not bind the City to large monetary or policy contracts in the waning days of Barthelemy's administration.[4] Thus, the City decided to contest the agreement when new City Attorney Avis M. Russell brought the consent judgment to Morial's attention. Shortly after the consent judgment had been signed and entered by the district court judge, the City---acting under its new administration---chose not to appeal the judgment, but instead moved to have the consent judgment set aside pursuant to Rule 60(b).

The Morial administration argued in its pleadings to annul the judgment that the written request to Barthelemy amounted to a "contract" between the two administrations and that the consent agreement and subsequent judgment for Carter was tantamount to a "breach" of such

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[3]In his testimony before the trial court, Barthelemy acknowledged instructing Torregano to settle the case for $1,000,000. He did not, however, recall discussing interest attached to the $1,000,000 figure. Barthelemy allowed that he did not personally prepare the judgment, but that the City Hall attorneys did so.

[4]The record includes two letters dated April 5, 1994 from Mayor-Elect Morial to Barthelemy. The letters referenced two possible commercial contract negotiations between the City and other entities and requested that all contracts be placed on hold pending the arrival of the new administration. Claiming to have previously requested the same, Morial reiterated that the City should sign any new contracts between April 5 and May 2, 1994.

contract.[5] Further, the City argued that pursuant to Rule 60(b)(1), the consent judgment between Carter and the City suffered from "mistakes" or "inadvertence" and lacked the requisite "meeting of the minds" in the following respects: (1) it calls for "interest from the date of judicial demand," a factor which would increase the settlement sum to Carter by about 20%; 2) it fails to address all of the parties, namely defendant Taylor;[6] 3) it directs payment to Carter in her role as mother of Vergil Carter in an attempt to discharge a debt owed to her minor child contrary to Louisiana law. The City also argued that the settlement was void pursuant to Rule 60(b)(4) because the plaintiff failed to comply with Louisiana's requirements for establishing a valid tutorship for the child, and in failing to obtain prior state court approval of the minor's settlement.

After an evidentiary hearing, the district court granted the City relief from the consent judgment based on the aforementioned mistake and inadvertence. Alternatively, the district court held that the consent judgment was void under Rule 60(b)(4) for want of compliance with the Louisiana Code of Civil Procedure Article 4721 *et al.*

After the consent judgment was set aside, Carter sought an appeal in this court pursuant to 28 U.S.C. § 1291 as construed by

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[5]In his testimony, Barthelemy denied having entered into any such agreement with Morial that would have prevented him from making binding agreements without Morial's express authorization.

[6]The judgment recites that upon satisfaction of the judgment, the suit would be dismissed as to defendants "City of New Orleans, Kevin Fenner and Joel Tallant" without mention of releasing Taylor, who was also a named defendant in the suit.

the collateral order doctrine.[7] Finding that the order granting the City's Rule 60(b) motion did not meet the requirements of the doctrine, this court dismissed Carter's appeal. The underlying wrongful death claim proceeded to a trial on the merits in July 1996, resulting in a jury verdict in favor of the defendants. On August 27, 1996, the district court entered judgment in favor of defendants, dismissing plaintiffs' complaint with prejudice and costs. On behalf of her minor son---Vergil Carter, Carter timely brings this appeal from the judgment of the district court that set aside the consent judgment and jury's verdict in the trial on the merits.

## II.
## STANDARD OF REVIEW

Carter disputes the City's assertion that Rule 60(b)(1), (4) and (6) afford bases for relief from the consent judgment. Before we can reach the question regarding whether the consent judgment is voidable under the discretionary prongs of Rule 60(b)(4).

This court is not often confronted with Rule 60(b)(4) review of a final judgment and has considered the application of Rule 60(b)(4) in the consent judgment context only in the rarest and most tangential of circumstances. See United States v. 119.67 Acres of Land, 663 F.2d 1328, 1331 (5th Cir. 1981) (Unit A) (interpreting a Rule 60(b) motion to set aside a consent judgment as one for relief under 60(b)(4) because "[*a*] judgment is not void simply because it is erroneous, but only where the

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[7]Under the collateral order doctrine, this court has jurisdiction to consider appeals of non-final judgments "that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U. S. 863, 867, 114 S. Ct. 1992, 1995-96 (1994).

rendering court lacked subject matter jurisdiction or acted in a manner inconsistent with due process of law"). We therefore look not only to our own precedent, but to the law of our sister circuits in determining our standard of review. Such sources indicate that we review the district court's ruling on a Rule 60(b)(4) motion de novo. See, e.g., Wilmer v. Board of County Comm'rs, 69 F.3d. 406, 409 (10th Cir. 1995). This circuit has stated:

> Typically, "[m]otions under Rule 60(b) are directed to the sound discretion of the district court, and its denial of relief upon such motion will be set aside on appeal only for abuse of that discretion." Seven Elves v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981). When, however, the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion, the judgment is either void or its not.

Recreational Properties, Inc. v. Southwest Mortgage Services Corp., 894 F.2d 311, 313-14 (5th Cir. 1986). Unlike motions pursuant to other subsections of Rule 60(b), rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not. The Circuit has explained that when the motion is pursuant to Rule 60(b)(4), however, the review is plenary and courts have little leeway as it is a per se abuse of discretion for a district court to deny a motion to vacate a void judgment. United States v. Indoor Cultivation Equipment From High Indoor Garden Supply, 55 F.3d 1311, 1317 (7th Cir. 1995). A judgment is void for purposes of Rule 60(b)(4) if the court that rendered it an order outside its legal powers. Id. at 1316; In the Matter of Edwards, 962 F.2d 641, 644 (7th Cir. 1992). The Ninth Circuit's approach is also instructive: "We review de novo . . . a district court's ruling upon Rule 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one." Export Group v. Reef Industries, Inc., 54 F.3d 1466, 1469 (9th Cir. 1995).

## III.
## RULE 60(B)(4) RELIEF

Because there is a paucity of case law construing Rule 60(b)(4) in our circuit, we find it useful to first consider the language and purpose of the rule. Rule 60(b) states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . or (6) any other reason justifying relief from operation of the judgment . . . .

Most circuits have interpreted Rule 60(b) quite narrowly, affording relief from final judgments only in the most specific circumstances. See VTA, Inc. v. Airco, 597 F.2d 220, 225 (10th Cir. 1979). These courts have noted that to succeed on a Rule 60(b) motion, a movant first "must show that his motion is timely, that he has a meritorious defense to the action, and that the opposing party would not be unfairly prejudiced by having the judgment set aside." National Credit Union Admin. Bd. v. Gray, 1 F.3d 262, 264 (4th Cir. 1993) (quoting Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987). A fourth threshold showing, 'exceptional circumstances," is sometimes noted. See, e.g., Werner v. Carbo, 731 F.2d. 204, 207 (4th Cir. 1984).

Suggesting that the City does not present sufficient grounds to have the district court set aside the consent judgment, Carter appears to invoke these threshold considerations. In the instant matter, Carter suggests that the City's Rule 60(b) motion is a

thinly veiled attempt to use Rule 60(b) as a substitute for a timely appeal which the City simply allowed to lapse. While the City did not file a notice of appeal within thirty days after entry of judgment provided for in Federal Rule of Appellate Procedure 4(a), its motion pursuant to Rule 60(b) was timely. As the City notes, its Rule 60(b) motion was filed less than four months after entry of the judgment---well within the one year time frame prescribed by Rule 60. By failing to pursue an appeal, the City limited itself to one avenue of relief to contest the judgment. We are not convinced, however, that the City use of the Rule 60(b) motion instead of an appeal indicates a questionable motive as Carter suggests. Further, pursuant to the even more expansive time limitations for filing a motion pursuant to Rule 60(b)(4), it is clear that the City's motion was not stale.

Though Carter's argument is itself without merit, we will address the important timeliness considerations associated with motions brought pursuant to Rule 60(b). The First Circuit has recognized:

> Rule 60(b)(6) may not be used as a back-door substitute for an omitted appeal, and, in all but the most exceptional circumstances, a party's neglect to prosecute a [timely] appeal will bar relief under the rule.

Hoult v. Hoult, 57 F.3d 1, 3 (1st Cir. 1995) (quoting Cotto v. United States, 993 F.2d 274, 277 (1st Cir. 1993). Motions brought pursuant to Rule 60(b)(4), however, constitute such exceptional circumstances as to relieve litigants from the normal standards of timeliness associated with the rule. While Rule 60(b)(1) motions must be brought within one year, we have held that motions brought pursuant to subsection (4) of the rule have no set time limit. This court has explained that "'[t]here is no time limit on an attack on a judgment as void. The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable,

and even the requirement that the motion be made within a "reasonable time", which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion.'" New York Life Insurance Company v. Brown, 84 F3.d 137, 142-43 (5th Cir. 1996) (quoting Briley v. Hidalgo, 981 F.2d 246, 149 (5th Cir. 1993)). Other courts have noted simply that "[u]nlike its counterparts, Rule 60(b)(4), which provides relief void judgments, 'is not subject to any time limitation.'" Orner v. Shalala 30 F.3d 1307, 1310 (10th Cir. 1994) (quoting V.T.A., Inc., 597 F.2d at 224 n.9 and accompanying text). While failing to prescribe concrete time limitations, the courts have established that the normal temporal considerations do not apply in the Rule 60(b)(4) context.

Under Rule 60(b)(4), this court will generally look toward two factors to determine voidness. The New York Life court stated that "'[a] judgment is "is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or it acted in a manner inconsistent with due process of law."'" Id. at 143 (quoting Williams v. New Orleans Public Serv., Inc., 728 F.2d 730, 735 (5th Cir. 1984)). The City, however, did not allege such jurisdictional defects or constitutional deficiencies in its motion, but instead insisted that Carter's own procedural failures rendered the judgment void. Some circuits have noted that a judgment is void if the rendering court was powerless to enter it. VTA, Inc., 597 F.2d at 224. While such holdings most obviously allude to a jurisdictional defect, they allow enough room to capture within their reach situations where the parties' failure to follow relevant law or procedure in securing the judgment will undermine its ultimate validity. Such instances fit into the slightly less restrictive definition offered by the Seventh Circuit when it declared that "[a] void judgment is one which, from its inception, was a complete nullity and without legal effect." United States v. Zima, 766 F.2d 1153, 1159 (7th Cir. 1985).

While relief under Rule 60(b) is considered an extraordinary remedy, this court has held that the rule should be construed in

order to do substantial justice. See, e.g., Greater Baton Rouge Gold Ass'n v. Recreation & Park Comm'n., 507 F.2d 227, 228-29 (5th Cir. 1975). We have counseled in the past, however, that "[t]he desire for a judicial process that is predictable mandates caution in reopening judgments." Bailey v. Ryan Stevedoring Company, Inc., 894 F.2d 157, 160 (5th Cir. 1990) (quoting Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977) (internal citation omitted). The First Circuit has also explained that "[I]n the interests of finality, the concept of void judgments is narrowly construed." United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661(1st 1990) (quoting United States v. Berenguer, 821 F.2d 16, 22 (1st Cir. 1987). The district court in the instant matter provided a related admonition when it further noted that such hesitance to reopen final judgments is "especially so in cases where a suit is terminated prior to adjudication on the merits." See Seven Elves, Inc. 635 F.2d at 403. As the Eleventh Circuit has articulated, the provisions of Rule 60(b) must be carefully interpreted to preserve the delicate balance the sanctity of final judgments and the "incessant command of the court's conscience that justice be done in light of all the facts." Griffin v. Swim-Tech Corporation, 772 F2.d 677, 680 (11th Cir. 1984).

## IV.
## LOUISIANA LAW REGARDING COMPROMISE OR SETTLEMENT OF A MINOR'S CLAIM

As noted above, the underlying wrongful death suit that is the basis for this litigation resulted in a consent judgment, the proceeds from which are to benefit the five year old son of the deceased. It is axiomatic under Louisiana law that a person compromising or settling the claim of a minor child shall follow certain explicit rules. In cases where such protections are not observed, "[t]he courts of Louisiana have been most protective of the minor's interests in the area surrounding settlement of claims, and have not hesitated to nullify and settlement or compromise that was not judicially approved." Leonard Oppenehim, The Basic

Elements of Tutorship in Louisiana, 44 Tul.L.Rev. 452, 493 (1970).

We thus find it prudent to examine the requirements set forth by Louisiana law for settlement of a minor's claim to determine whether such procedures were properly met. The Louisiana Code of Civil Procedure details the manner in which the claims of a minor may be compromised or settled. The statue imposes upon parental administrators the duties and obligations of legally-appointed tutors. Article 4265 allows that "with the approval of the court as provided in Article 4271, a tutor may compromise an action or right by or against the minor, or extend, renew, or in any way modify the terms of an obligation owed by or to the minor." Article 4271, in relevant part, further prescribes:

> The tutor shall fine a petition setting forth the subject matter to be determined affecting the minor's interest, with his recommendations and the reasons therefor, and with a written concurrence by the undertutor. If the court approved the recommendations, it shall render a judgment of homologation.

The statutory requirements for compromising and settling the claims of a minor are rigorous because of "the general policy of our law to protect all minors from the possible consequences of immaturity[.]" Johnson v. Ford Motor Company, 707 F.2d 189, 194 (5th Cir. 1983) (quoting State in Interest of Dino, 359 So.2d 586, 593 (La. 1978) (footnote omitted), cert. denied, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978)).

Carter urges this court that the time the consent judgment was confected, the necessary tutorship proceedings regarding the claims of her minor son had occurred. Indeed, the record indicates that on October 8, 1992, Carter filed a Petition for Small Tutorship of Vergil Carter in Louisiana State Court, Orleans Parish. Such petition was approved by order of the court on

October 8, 1992, and Carter was properly appointed tutor of her minor son pursuant to the court's Letter of Tutorship signed October 9, 1992. Carter clearly completed the first step required by Louisiana law to settle the claim of her minor son. As the Johnson court admonished, however, "the tutorship arrangement is not in itself sufficient protection of the unemancipated minor's interests. The Louisiana Courts must, under Article 4271, maintain a careful oversight of the interests of the minors brought before them by parents or tutors." Id. at 194.

Carter failed to follow the remaining statutory requirements for compromising the claim of her son. Namely, she did not seek the prior judicial approval necessary for settling a minor's claim. Thus, the state court was not allowed to exercise its oversight of the minor's interests prior to the confection of the consent judgment. Such a failure is fatal in this context because of the affirmative judicial obligation to review a tutor's requests regarding the protected interests of the minor. The "courts [are] the final preventative from unrestrained and unwise compromise of the minor's interests." Id. at 194 (citing Oppenheim). Such keen judicial examination is meant to offer protection from both self-interested tutors seeking to augment their own personal wealth and well-meaning tutors who may be unaware of the potential pitfalls associated with a particular settlement. Ultimately, the statute and the jurisprudence elevated the protection of the delicate interests of the minor over all other considerations. This court has found:

> For adults functioning on behalf of minors there remains a continuing duty to act in the best interests of the child—"as prudent administrator," La.Code.Civ.Proc. art. 4262—and to seek and obtain prior court approval under 4271 before compromising those interests. *Compromises entered into absent these protections are of no legal effect.* . . . . 'the courts of Louisiana have been most protective of the minor's interest in the area of settlement

of claims and have not hesitated to nullify any settlement or compromise that was not judicially approved.'

Id. (emphasis added).

The Achilles' heel of the appellant's situation lies in her failure to obtain state court approval of the settlement agreement prior to confecting the federal consent judgment with the City. As the Johnson court makes clear, establishing tutrix status with regard to the minor does not in and of itself meet the explicit statutory requirements for compromise and settlement of such claims. Because Carter did not obtain the required judicial approval of the settlement agreement from the state court in which she filed her Petition for Small Tutorship, the consent judgment is necessarily of no legal effect.

Citing Southern Shipbuilding Corp. v. Richardson, 372 So.2d 1188 (La. 1979), Carter suggests that the failure to obtain court approval does not disturb the validity of the agreement because no monies have yet been disbursed with relation to the settlement. She further urges that Louisiana case law supports the proposition that the tutor or tutrix may petition for state court approval of a minor settlement on a timely basis after settlement has been reached and prior to satisfaction of the settlement terms. See In re Tutorship of Ingraham, 565 So.2d 1012 (La.App. 1st Cir. 1990); Succession of Helmers, 637 So.2d 1302 (La.App. 4th Cir. 1994). We find that Carter has misunderstood the proposition for which these cases stand. Southern Shipbuilding, the case which best supports Carter's argument, suggests that tutor qualification may be obtained at the same time that court approval is sought after a "tentative settlement has been agreed upon." 372 So.2d at 1190. The consent judgment in question, however, is not a tentative settlement. Despite the fact that no funds have been dispersed to Carter by the City, the judgment was finalized in federal court before the agreement was approved *in any form*, by the state court.

Noting that she has merely confected an agreement in her role as tutrix, Carter suggests that the appropriate remedy in the case is not to invalidate the settlement agreement, but to allow the plaintiff to seek approval of the minor settlement, if state law applies. She further urges that there is no Louisiana law mandating that court approval under article 4271 be obtained at the time the settlement is reached. Carter is correct in her observation that article 4272 requires a tutor to obtain court approval before receiving money on behalf of a minor. Article 4272 provides:

> In approving any proposal by which money will be paid to the minor, the court may order that the money be paid directly into the registry of the court for the minor's account, to be withdrawn only upon approval of the court and to be invested directly in an investment approved by the court.

Carter apparently understands this article as requiring approval only in relation to the disbursement of funds; however, the case law which she brings to our attention does not support her contention. We therefore disagree with such interpretation. A belated request for state court permission to disburse funds of the minor will not cure an earlier failure to obtain permission to compromise the minor's claim itself. Without such prior approval, the statutory directive requiring judicial oversight of minor settlements would be rendered. In order to ensure that minor's claims are carefully scrutinized, Louisiana courts and the Fifth Circuit have found the statutory scheme to compel prior approval of a settlement or compromise of such claims.

As previously mentioned, the Johnson court noted the duty of tutors to seek and obtain prior court approval before compromising a minor's interests. In Succession of Helmers, 637 So.2d 1302, 1308 (La.App. 4th Cir. 1994), the court noted that "even if [the appellant] was appointed tutor Court approval was

required before [the appellant] could act for the minors to sigh the satisfaction of judgment." In Snowden v. Huey P. Long Memorial Hospital, 581 So.2d 287 (La.App. 3rd Cir. 1991), the court set forth the procedure governing settlement of minor claims. "In approving a minor's settlement, a court must not only grant authority to compromise to the party properly representing the minor, but must also determine whether the terms of the proposed compromise are in the best interests of the minor." Id. at 289-90 (footnote and citation omitted). The implication of such language is clear—the court must have some meaningful exercise of authority over proposed compromises and settlements. Obtaining post hoc judicial approval of a consent judgment as Carter planned would tear away at the usefulness and underlying concerns of article 4271 itself. As one commentator observed, "[w]hen tutors attempt to compromise the claims or modify the obligations of their wards without receiving prior judicial approval, their actions are absolute nullities . . . ." Oppenheim at 493.

Because the consent judgment in this case is void, we affirm the district court's decision to set aside.

## V.
## THE TRIAL

Having vacated the consent judgment, we now turn to Carter's arguments which stem from the trial on the merits. She avers that the jury's verdict is inconsistent with the law applicable in this case and that this court should grant a judgment in her favor as a matter of law. She urges that 1) the jury's decision should be reversed and/or a new trial granted because the evidence presented at trial shows that Fenner and Tallant were objectively unreasonable in their use of force against Braud; 2) the trial judge committed reversible error in permitting testimony regarding Braud's alleged prior violent behavior in the home, and 3) the trial judge erred in allowing a coroner testifying as an expert witness to testify regarding the behavior of a person who is under

the influence of alcohol. We consider each of these claims separately.

## VI.
## STANDARD OF REVIEW

Under Boeing Co. v. Shipman, 411 F.2d 365, 368-70 (5th Cir. 1969) (en banc), this court must uphold the jury's verdict against Carter unless the evidence, viewed in the light most favorable to the City, required a reasonable jury to find in Carter's favor. Crest Ridge Construction Group, Inc. v. Newcourt Inc., 78 F.3d 146, 150 (5th Cir. 1996). "The aim of the Court on review is to determine whether a rationale jury could reach the conclusion that the jury actually reached." Woodall v. City of El Paso, 49 F.3d 120, 1124 (5th Cir. 1995) (citing Fields v. J. C. Penney Co., 968 F.2d 533, 536 (5th Cir. 1992). This court has recognized:

> If the facts and reasonable inferences therefrom point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict, viewing the facts in the light most favorable to the party against whom the motion is made, and giving that party the advantage of fair and reasonable inferences which the evidence justifies, then a motion for judgment as a matter of law should be granted.

Id. (citing Hamilton v. Grocers Supply Co., Inc., 986 F.2d 97 (5th Cir. 1993). Finally, a motion for a new trial based on evidentiary grounds should not be granted unless, at a minimum, the verdict is against the great weight of the evidence, not merely against the preponderance of the evidence. Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 208 (5th Cir. 1992) (citing Conway v. Chemical Leaman Tank Lines, Inc., 610 F.2d 360,363 (5th Cir. 1980)).

## VII.
## THE JURY'S VERDICT REGARDING EXCESSIVE FORCE

Carter argues that the evidence presented at trial "overwhelmingly" indicates that Fenner violated Braud's constitutional rights under 42 U.S. C. § 1983 so as to require this court to conclude that no reasonable jury could have found in favor of the defendants. She argues that the jury's verdict that the defendants were objectively reasonable in shooting Braud is incorrect and should be set aside by this court. Carter further observes that the jury's verdict is also inconsistent with applicable law in this case, which provides that an officer is objectively reasonable in using excessive force where a suspect threatens the officer with a weapon or creates a belief that the suspect will assault the officer or others with a deadly weapon. Stroik v. Ponseti, 35 F.3d 155, 158 95th Cir. 1994). Carter argues that Braud was unarmed and thus presented no threat to the officers and that the evidence illustrates that he was fleeing from the officers at the time of the shooting. The City counters by reminding us of the trial judge's observations:

> . . . the Court finds that sufficient evidence exists to support the jury's verdict. Both sides presented contradictory eyewitness testimony, and the outcome hinged on this credibility question. The testimony of Tallant and Fenner supported a verdict for the defendants. The jury was entitled to believe these witnesses and disbelieve others. See Boyle v. Pool Offshore Co., 893 F.2d 713, 717 (5th Cir. 1990) (the credibility of witnesses is for the jury to determine). Thus the Court is unable to conclude that no reasonable jury could have found as this jury did.

The City identifies the elements necessary to prove an excessive force claim under § 1983 as 1) a significant injury,[8]

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[8]This requirement has been deleted. See Hudson v. McMillan, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992); Knight v. Caldwell, 970 F.2d 1430 (5th Cir. 1992).

which 2) resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of which was 3) objectively unreasonable. Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc). Noting that the second element requires a showing that the force used was not only excessive, but clearly more than the force needed to subdue the threat, the City argues that Carter failed to bring evidence to prove these elements were met. Thomas v. Frederick, 766 F. Supp. 540, 554 (W.D. La. 1991). The City advances that in order to determine the objective reasonableness of the use of force in a particular situation, the trier of fact must judge from the perspective of a reasonable officer on the scene. Graham v. Connor, 450 U.S. 386, 396-97, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).

We find that in view of the conflicting evidence, Carter has failed to prove that the elements of an excessive force claim were met. The jury heard evidence sufficient to allow it to conclude that the officers were objectively reasonable in shooting Braud. The testimony of both officers indicates that they were informed by the police dispatcher that the suspect, known as "Vergil," was possibly armed and was possibly selling drugs. Fenner testified that upon arriving at the scene and performing the initial patdown frisk, he found a black film canister on Braud's person which appeared to contain marijuana. Fenner suggested that it was at this point (once the officers had probable cause and were preparing to arrest Braud) that Braud began to fight with the officers and resist their attempts to handcuff him. Fenner further testified that because of Braud's behavior, the officers did not have an opportunity to conduct a complete search for weapons. The accounts of various witnesses differ markedly as to the particulars of the ensuing struggle and whether they saw Braud reaching for Tallant's weapon at the time Fenner shot him. The testimony indicates, however, that the witnesses all agreed that a struggle did occur and that it was violent enough to carry Tallant and Braud to the ground, where the struggle continued.

Carter's witnesses offered a range of testimony as to the events that occurred just prior to the shooting. Some testified that Braud was resisting arrest at the time of the shooting, while others suggested he was running away from the officers. Still other witnesses were unclear as to what Braud was doing at the time Fenner shot him. The coroner, Dr. Paul McGarry, testified that he found bruises and contusions in Braud's brain tissue during his autopsy—evidence that Carter contends is illustrative of excessive force. The City maintains that the evidence of bruises indicates that there had been a struggle, and the other physical evidence presented at trial supports the officers' testimony that Fenner fired at Braud in self-defense and to protect his partner's safety.[9]

Considering the evidence in the light most favorable to the defendants, we do not find that Cater directed us to evidence which requires us to conclude that no reasonable jury could have found favor of the defendants. She failed to prove the elements required for an excessive force claim pursuant to § 1983 and thus her Rule 50(b) motion to set aside a jury verdict and render judgment as matter of law must be denied. Further, because the jury verdict was not against the great weight of evidence, we cannot find that Carter is entitled to a new trial.

## VIII.
## THE TESTIMONY REGARDING BRAUD'S BEHAVIOR IN THE HOME

Carter exhorts us to conclude that the trial judge erred in admitting the testimony of Tahara Braud and Esteen addressing the issue of violence displayed in the home by Vergil Braud. Carter argues that such testimony was admitted over objections, and was nonprobative and therefore irrelevant. Noting that "[t]he

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[9] The physical evidence admitted at trial indicated that Braud was shot once in the chest at a downward angle consistent with a position on the ground, and that his blod alcohol concentration was .18.

violence in the home to which the witnesses testified had no bearing on the police officer's decision to restrain Vergil Braud by inflicting him with a fatal gun shot wound[,]" Carter contends that this information was completely unrelated to what occurred at the scene of the shooting. She allows that even if the evidence was relevant, it should have been excluded because its prejudice to the plaintiffs greatly outweighed its probative value. The City points out that the admissibility of such testimony was the subject of a motion in limine filed by plaintiffs and ruled upon prior to trial. The City contends that the trial court permitted only very limited and general testimony to be introduced to the effect that Braud had engaged in violent behavior in the home, but did not permit detailed questioning of such incidents.

We find that the court's ruling on the admissibility of this evidence struck an appropriate balance between the probative value of such evidence and its possible prejudicial effect. Further, because of Carter's attempt to present testimony regarding Braud's lack of resistance and passivity, the City entitled to bring limited rebuttal evidence of Braud's violent behavior solely in order to support its contention that he did resist arrest.

## IX.
## THE CORONER'S EXPERT TESTIMONY

Arguing that the coroner was not qualified to offer an opinion on the behavior of people (and, specifically, Vergil Braud) under the influence of alcohol, Carter urges that the admission of such testimony was an abuse of the trail judge's discretion. We find Carter's position is untenable.

The plaintiffs presented Dr. McGarry as a coroner and an expert in forensic pathology whose qualifications included a degree in medicine. On cross-examination, testimony was elicited from McGarry regarding Braud's blood alcohol level at the time of death and the general effect of alcohol on a person's behavior.

Such testimony was allowed because these topics fall well within the expertise of a medical doctor as well as McGarry's extensive experience in dealing with persons acting under the influence of alcohol.

While Carter complains that such testimony was mere speculation, we find that it goes to the heart of the disputed question whether Braud's behavior was so combative and threatening as to support the officer's perception that the was about to inflict bodily harm upon one of them. Carter's argument that the admission of this testimony warrants the court's setting aside the verdict or granting a new trial is thus without merit.

## X.
## CONCLUSION

For the foregoing reasons, we AFFIRM the district court's decision, finding that the district court 1) properly set aside the consent judgment pursuant to Rule 60(b)(4), 2) properly refused to disturb the jury's verdict, and 3) made no error in admitting evidence so as to warrant plaintiff's motion for a new trial.

# APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NICOLE MARIE CARTER

versus

KEVIN FENNER, ET AL

**ORDER and REASONS**

Defendant, the City of New Orleans, moves in this Civil Action 92-3497, to vacate the consent judgement (R.D. 58) entered in this action on May 2, 1994, between plaintiffs, Nicole Carter, on behalf of her minor child, Vergil Carter and the Estate of Vergil Braud, and defendants, the City of New Orleans and Kevin Fenner. Plaintiffs oppose said motion. An evidentiary hearing was conducted August 10, 11, 1994.

The City of New Orleans ("City") moves pursuant to Federal Rule of Civil Procedure 60 (b) for relief from May 2, 1994 Consent Judgement. That rule provides:

**Rule 60. Relief From Judgement or Order**

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are party's legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an

> adverse party; (4) the judgement is void; (5) the judgement has been satisfied, released or discharged, or a prior judgement upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgement should have prospective application; or (6) any other reasons justifying relief from the operation of the judgement....

This suit arises out of the October 5, 1992 incident in which New Orleans police officer Kevin Fenner shot and killed Vergil Braud. Defendants, in addition to Fenner, included the City of New Orleans, Arnesta Taylor (Police Chief for the City) and Joel Tallant (Fenner's companion police officer).

A companion suit, Civil Action 92-3496, was also filed with regard to the aforesaid October 5, 1992 incident. Except for Police Chief Taylor the defendants were the same as those in C.A. 92-3497. However the plaintiffs, in addition to Ms. Carter, were Jacqueline Esteen (mother of the deceased Vergil Braud) in her individual capacity and as tutrix of Tahara Braud (minor sister of the deceased) and Christy Francis (major sister of the deceased).

These two suits were consolidated for trial, which was set for May 2, 1994. That date, was coincidentally, inauguration day for the recently elected city officials. During the last few days of April 1994, in discussions, including pre-trial conference in chambers, Assistant City Attorney George A. Blair III made a compromise offer of $100,000.00 to counsel Ms. Carter, which offer was declined. Mr. Blair then met with then Mayor Sidney J. Barthelemy and was authorized to increase the offer to $300,000.00 and no more. This offer was also declined.

On Friday, April 29, 1994 Ms. Sonje W. Wilkerson, counsel for Ms. Carter, with the consent of Ms. Kathy Lee Torregano, the City Attorney, met with Mayor Barthelemy. The meeting resulted in a purported agreement which was thereafter set forth in a written consent

judgement prepared at Ms. Wilkerson's direction in her office, brought to City Hall and signed by her and Ms. Torregano.

The Court was notified by telephone of this development on April 29 and canceled the May 2 jury trial because of it, and also because of the earlier request for postponement presented by Mr. Blair on behalf of the City due to the pending change in attorneys in the City Attorney's office resulting from the change in administration, and because the Court anticipated that remaining claims would be settled. The consent judgement document was presented to the Court on May 2 for signature and filed on that date.

Mayor Barthelemy testified that in his discussion with Ms. Wilkerson he was aware of the unfortunate nature of the October 5, 1992 incident which was the subject matter of the litigation and that he felt it to be in the best interest of the City to effect compromise. Despite Ms. Wilkerson's request for a substantially greater sum, he asked Ms. Torregano by telephone if she agreed that a $1 million offer would be appropriate under the circumstances. Ms. Torregano, who also testified, left it in the Mayor's discretion. Ms. Wilkerson arranged for the consent judgement document to be prepared in her office. It was prepared and then brought to City Hall where it was signed.

Mayor Barthelemy testified that he felt it to be in the City's best interest to dispose of the litigation. In the last hectic days of his administration, he was confronted with may details and concerns. He wanted in this matter to "clean the plate" so to speak. He specifically did not recall any discussion of interest in addition to the $1 million and he certainly expected that the City's potential liability would be satisfied, including that of his Chief of Police, Arnesta Taylor. Mayor Barthelemy was apparently not made aware of the consolidated suit pending for trial on May 2.

Ms. Torregano confirmed the telephone conversation with the Mayor regarding the $1 million compromise and that she was told of its

acceptance and authorized to sign a consent judgement. She did not recall any mention of interest in addition to the $1 million and she certainly expected all City defendants to be included. Ms. Torregano testified that she was aware of the consolidated suit pending for trial, but she did not discuss the pendency of the consolidated case, naming a number of city defendants, with the former Mayor.

The consent judgement calls for "interest from date of judicial demand," a factor which would increase the settlement sum approximately $200,000.00 or 20%. This was the mistake, clearly not the agreement made by the Mayor. Also the document ignored defendant Arnesta Taylor. It recites that upon satisfaction of the judgment the suit would be dismissed as to defendants "City of New Orleans, Kevin Fenner and Joel Tallant." If not a mistake this omission was clearly inadvertence not anticipated by the Mayor or the City Attorney. Arguably the failure to have the whole matter disposed of might constitute inadvertence inasmuch as Mayor Bathelemy wanted to "clean the plate" and have the litigation disposed of in the City's best interest but yet as concerns the consolidated companion case, Mayor Barthelemy left half the plate full. The Court recognizes, of course, that Ms. Wilkerson was negotiating for her clients, not the other claimants.

In addition, the means by which the Consent Judgment directs payment is further evidence of mistake on the part of the parties. Payment of the $1 million settlement amount is directed to "Nicole Carter, on behalf of her minor child, Vergil Carter and the Estate of Vergil Braud." In Succession of Helmers, 637 So. 2d 1302, 1307 (La. 4th Cir. App. 1994), the Louisiana Fourth Circuit Court of Appeals held that payment by a defendant to a parent "individually and on behalf of his minor children...," did not serve to discharge the debt owed to the children. Rather, the payment was deemed to be one made directly to the parent. Although the defendant in Hellmers paid a $1 million judgement to the father "on behalf of the minor children," the court held that such payment was to the wrong party and the children still had a claim against defendant for $1 million.

Here, both Ms. Wilkerson and the City testified that it was their intent that the Consent Judgement and corresponding payment of the judgement would discharge the City's liability to the minor child, Vergil Carter. Given the prevailing case law, the Consent Judgement clearly did not have the effect intended by the parties. Payment to "Nicole Carter on behalf of her minor child, Vergil Carter" would in essence be a payment to Nicole Carter herself and would not discharge the City of its liability to the minor child. Thus, the Court finds that the Consent Judgement was erroneous inasmuch as it provided for payment to the wrong party, and such error undermined the parties' attempted agreement.

"The enforceability of a settlement agreement is governed by the law of the forum state." Davis v. Huskipower Outdoor Equipment Corp., 936 F. 2d 193, 196 (5th Cir. 1991). Under Louisiana law, "to have a valid compromise, there must be a meeting of the minds between the parties as to what they intended when the compromise was reached." Parich v. State Farm Mutual Automobile Ins. Co., 919 F. 2d 906, 914 (5th Cir. 1990), cert. denied, sub nom. Judice v. Parich, 499 U.S. 976, 111 S.Ct. (1991). Certainly if there was a "meeting of the minds" between Mayor Barthelemy and Ms. Wilkerson, such meeting was not reflected in the Consent Judgment. That is, the May 2, 1994 Consent Judgement does not appear to reflect the terms to which Mayor Barthelemy actually consented and should not be permitted to stand. See, e.g., Smith v. Widman Trucking & Evacuating, 627 F.2d 792, 796 (7th Cir. 1980) ("a consent judgement shown to have been entered...without the client's actual consent may be the subject of Rule 60 (b) relief").

While final judgements are not to be lightly reopened, Rule 60 (b) is to be "liberally construed in order to do substantial justice." Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981). This is especially so in cases where a suit is terminated prior to adjudication on the merits. Id. at 403 ("Rule 60 (b) will be liberally construed in favor of trial on the full merits of the case").

Accordingly, the Court concludes that the elements of F.R.C.P. Rule 60 (b) (1), mistake, inadvertence and perhaps excusable neglect are present and that the City is entitled to the relief sought. Having reached this conclusion it is unnecessary to delve into other grounds presented by the City. Nevertheless, the Court briefly comments on pertinent alternative grounds.

The City argues that the judgment is void because the plaintiff failed to comply with the requirements for establishing a valid tutorship. The Court need not consider the validity of the tutorship at this time because it finds that even assuming the existence of a valid tutorship, plaintiffs did not comply with Louisiana law in settling the case, thereby rendering the settlement void.

While motions under rule 60 (b) for relief from judgment are typically directed to the discretion of the district court, when the motion is based on a void judgment under Rule 60 (b) (4), the "district court has no discretion --the judgment is either void or it is not." Recreational Properties, Inc. v. Southwest Mortgage Service Corp., 804 F.2d 311, 313-14 (5th Cir 1986). The Consent Judgment purports to settle the claims of plaintiffs "Nicole Carter, on behalf of her minor child, Vergil Carter and the Estate of Vergil Braud," against defendants "City of New Orleans, Kevin Fenner and Joel Tallant," for a lump sum of $1 million. Aside from the standard "sixty-day order of dismissal" entered by the Court, no other documents were presented to the Court of filed into the record evidencing the attempted settlement.

"The Louisiana Code of Civil Procedure carefully details the manner in which the claims of a minor may be compromised and settled." Johnson v. Ford Motor Co., 707 F.2d 189, 193 (5th Cir. 1983). Under Louisiana Code of Civil Procedure art. 4271, court approval is required before action can be taken affecting a minor's interest. Such approval generally requires that the tutor acting on behalf of the minor "file a petition setting forth the subject matter to be determined affecting the minor's interest, with his recommendations and

the reasons therefor, and with a written concurrence of the undertutor. If the court approves the recommendations, it shall render a judgment of homologation." La.C.C.P. art. 4271. In order for a judgment on behalf of a minor to be valid, it is necessary that the adult acting on behalf of the minor in compromising a claim

> seek and obtain prior court approval under article 4271 before compromising those interests. Compromises entered into absent these protections are of no legal effect.

Johnson, 707 F.2d at 194.

Here, there is no evidence of any recommendations made to the proper court or of any approval thereof. Simply stated, nothing in the record indicates that the requirements of Louisiana law for effecting a minor settlement were complied with. Hence, the instant Consent Judgment would appear to have "no legal effect."

In addition, where a settlement purports to extinguish claims of both a minor and his parent for one lump sum without delineating what amount is to go to each, the settlement is nullity. Snowden v. Huey P. Long Memorial Hospital, 581 So. 2d 287, 290 (La. App. 3d Cir.), writ denied, 583 So. 2d 483 (La. 1991). In Snowden, the parents of a minor child sued individually and on behalf of their minor child for damages resulting from medical malpractice at the time of the child's delivery and birth. The defendants (the State) agreed to pay the parents $500,000 with legal interest, plus all future medical expenses incurred by the child, and the parents agreed to dismiss their lawsuit. Id. at 288.

Two years later, Gloria Iles and Margeret Deal, on behalf of the minor child, filed in the previously dismissed suit, a "motion to rescind, annul, and reinstate." Iles and Deal were the minor child's aunts and had been appointed the child's provisional tutrix and undertutrix in a separate tutorship proceeding with the consent of the parents. Iles and Deal sought to annul the settlement between the parents and the State

because it did not comply with the requirements of the Louisiana Code of Civil Procedure for the settlement of a minor's claim. Id. at 288-89. The court of appeals affirmed the invalidation of the settlement and the reinstatement of the suit despite the fact that it found that

> [t]here is no doubt that the attorney for the parents of the injured minor and the attorney for the State negotiated in complete good faith in an attempt to reach a settlement of this unfortunate event. * * * It is difficult to believe that this settlement would have been any different had all of the formalities of the law been followed.....However, this Court is compelled to follow the letter of the law and not the spirit of the law in dealing with the claims and property of minors. This Court cannot relinquish that responsibility even where there has been no evidence of wrongdoing on anyone's part. In protecting the minor the letter of the law must be followed as well as the spirit of the law.

Id. at 291.

Here, plaintiffs did not even go as far as the Snowden plaintiffs in attempting to comply with the statutory requirements for minor settlements. Inasmuch as "'substantial compliance with the law' [war not sufficient" in Snowden, the actions of the plaintiffs in this case are similarly not sufficient. Thus, even if the Court were to find that discretionary relief from judgment pursuant to Rule 60 (b) (1) is not appropriate, the Court would be compelled to grant such relief pursuant to Rule (b) (4).

Finally, the City argues that Ms. Wilkerson's conduct in speaking directly with former Mayor Barthelemy in the absence of his attorney constituted attorney misconduct. Rule 4.2 of the Louisiana State Bar Association Rules of Professional Conduct provides in pertinent part that

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The City argues that Ms. Wilkerson's direct discussions with Mayor Barthelemy on April 29, 1994 violated Rule 4.2 as well as an alleged order from late Magistrate Judge Michaelle P. Wynne.

The alleged order from Magistrate Wynne was little more than a restatement of the prohibition set forth in Rule 4.2 above. Accordingly, even in the absence of such an order, Ms. Wilkerson's actions were restricted by the rule of conduct. However, the Court finds that Ms. Wilkerson did not violate that rule.

Undisputed testimony at the evidentiary hearing by former city Attorney Kathy Torregano indicated that she gave Ms. Wilkerson permission to speak directly with Mayor Barthelemy about the settlement of the case. Such explicit permission negates the prohibition of Rule 4.2, thereby allowing Ms. Wilkerson to speak to Mayor Barthelemy without violating the rule. The wisdom of granting such permission is not an issue this Court needs to consider. It is enough that the evidence demonstrates Ms. Torregano gave Ms. Wilkerson permission to speak to the Mayor for this Court to conclude that Ms. Wilkerson did not violate Rule 4.2.

Considering the foregoing, the Court finds that the Consent Judgment entered in this Civil Action on May 2, 1994 cannot stand. Accordingly,

**IT IS ORDERED** motion of defendant, the City of New Orleans, to Vacate the Consent Judgment (R.D. 62) be and hereby is **GRANTED.**

**IT IS FURTHER ORDERED** that the Consent Judgment

entered herein on May 2, 1994 (R.D. 58) be and hereby is **RECALLED, VACATED AND SET ASIDE,** and it follows that the Court's procedural Order of Dismissal (R.D. 60) be also **RECALLED, VACATED AND SET ASIDE.**

**IT IS FURTHER ORDERED** that the above-captioned civil action be again **CONSOLIDATED** with "Nicole Marie Carter, et al v. Kevin Fenner, et al" C.A. No. 92-3496, and that these consolidated actions be returned to the Court's trial calendar. A status conference is scheduled for September 8, 1994 at 10:00 a.m. in Chambers for the purpose of selecting new trial and pre-trial conference dates in the consolidated actions.

New Orleans, Louisiana, September 1, 1994.

s/Marcel Livaudaus, Jr.
**MARCEL LIVAUDAIS, JR.**
United States District Judge